

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.11831 OF 2016

Fatema Ibrahim Ezzaddin ... Petitioner
vs.
Ibrahim Qaid Joher Ezzaudin .Respondent

with
WRIT PETITION NO.11830 OF 2016

Arwa Taha Saidfuddin .. Petitioner
vs
Taha Mufaddal Saifuddin ... Respondent

..

Mrs.Taubon F.Irani for Petitioner
in both Petitions
Mr.R.T.Lalwani with Ms.Sadhna Jaykar
I.b Mr.Jignesh Shah for Respondent
in both Petitions.

CORAM : G.S.KULKARNI, J.
DATE : FEBRUARY 22, 2018.

P.C.:

Heard learned counsel for the parties.

2. These two petitions challenge a common order dated 29.4.2016 passed by the learned Judge, Family Court at Mumbai on an application of the petitioner for interim access of the minor children and also on an application for interim custody. The Family Court in deciding these interim applications has passed the following order:

1. *“Applications at Exh 22 in petition no.D-58/2014 and Application at Exh.25 in petition no.D-59/2014 are hereby rejected.*

2. Both the applications at Exh 8 in petition no.D-59/2015 and petition no.D-60/2015 are allowed as under :

a) The non-custodian/mothers are entitled to have an access to the respective children namely Nasreen Hussain, Taher, Mustafa and Murtaza at Children Complex of this Court, twice in a month i.e on 1st and 3rd Saturdays of every month between 12 noon to 4.30 p.m. till final decision of the main petition.

b) So far as other children namely, Khadija, Murtaza Ibrahim, Sakeenah and Mohammed, who are studying at Surat, are concerned, the non-custodian parent/mother shall have an access to their respective above children once in a week i.e. every 1st Saturday of every month and in case of holiday on 1st Saturday, on 3rd Saturday of same month, at Children Complex, F.C.Bandra in between 12 noon to 4.30 p.m. till the decision of petition.

c) Custodian parents/Fathers are directed to bring the children as directed above, at Children Complex of this Court for giving access to mothers.

d) Said access shall be supervised by Marriage Counsellor whosoever on duty in the Children Complex on that day.”

Dt: 29th April 2016

S/d
(Hitesh K.Ganatra)
Judge
Family Court No.3,Mumbai

3. These petitions were heard by the Court from time to time. By an order dated 5.12.2017 by consent of the parties, Dr.Chavda was appointed to counsel the children in place of Dr.Nulwalla. The Court observed that the children will attend Dr.Chavda's Counselling Centre on 23.12.2017. Dr.Chavda was requested to give appointment on 23.12.2017 in the interests of the children.The petitions were thereafter placed for consideration of the Court on 11.1.2018. In the

meantime, the access which was granted by the Family Court was continued.

4. On 11.1.2018 considering the peculiar facts of the case the Court was of the opinion that it would be proper that in the interest of justice that the parties remain present on 22.1.2018 in Chambers at 4.30 p.m. A chamber hearing was held on 22.1.2018 and thereafter again on 29.1.2018. It appeared to be a meaningful discussion with the parties. To bring about a consensus on the issue of access, it was agreed between the parties that access can be granted at a neutral and more informal and conducive atmosphere so that children are comfortable. On 31.1.2018 the Court accordingly passed the following order :

1. *“Not on Board. Taken on board.*

2. *Learned counsel for the parties, on instructions of their respective clients, state that they have arrived at a consensus on the venue of the next scheduled access of the children to be taken by the petitioner on 3rd February 2018 as per the orders passed by the Family Court, be permitted at Amateurs Riding Club, Mahalaxmi, Mumbai instead the Children's Complex of the Family Court, Mumbai. This is quite a positive development. This arrangement would being fact in the interest of the parties as also the children and would provide more informal atmosphere. However, considering the request as made on behalf of the parties, it would be appropriate that on the scheduled access which would be undertaken on 3rd February 2018 between 12.00 pm to 04.00 pm, an independent observer as appointed by the court shall also informally remain present and make his submissions in regard to the scheduled access and place a report of the same before this Court. Accordingly, the learned Member Secretary, Maharashtra Legal Services Authority is requested to depute a representative who can make such report.*

3. *Copy of this order be forwarded to the learned Member Secretary, Maharashtra Legal Services Authority, High Court, Mumbai.*

4. *Place this Petition under the caption 'for direction' on 14th February 2018.*

5. *Parties to act on the authenticated copy of this order.”*

5. In pursuance of the said order, the report dated 3.2.2018 of the representative of the Maharashtra State Legal Services Authority who had remained present at the time of access was placed on record. It would be desirable to note the relevant contents of the said report, which reads thus :

2) *“In view of the above order, the Hon'ble Member Secretary, Maharashtra State Legal Services Authority vide order dated 01.02.2018 nominated the undersigned as an Observer to remain present during the scheduled child access on 3rd February 2018 between 12.00 pm to 04.00 pm at Amateurs Riding Club, Mahalaxmi Mumbai and directed to submit the report before the Hon'ble High Court.*

3) *As per the directions, the undersigned reached the Amateurs Riding Club, Mahalaxmi on 3rd February 2018 at about 11.45 a.m. The petitioners, Fatema Ibrahim Ezzuddin and Arwa Taha Saifuddin were already present at the venue. On behalf of the respondent, Mufaddal Motiwala, Guardian for both the families arrived alongwith the children in three different cars, viz Jazz, Ertiga and Mercedes. There were altogether 6 children, 3 from Ezzuddin family and 3 from Saifuddin family.*

Ezzuddin Family:

- 1. Murtuza*
- 2. Nisreen*
- 3. Husain*

Saifuddin Family:

- 1. Taher*
- 2. Mustafa*

3. Murtuza

4) However, it was informed that one of the child i.e Mohammed from Saiffudin family could not come due to illness. Two persons named Mr Yusuf and Mr.Juzer accompanied the children and were present during the access alongwith the guardian Mufaddal Motiwala.

5) The Guardian ,m Mufaddal Motiwalla informed that the children wish to ride horse in the Amateurs Riding School. The Amateurs Riding School was at the distance of about 1 to 2 km from the Amateurs Riding club. The petitioners, Fatema Ezzuddin and Arwa Saifuddin initially were not willing to go to the Amateurs Riding School. However, seeing the interest of the children and their wish for riding the horses both of them agreed to go to the Amateurs Riding School.

6) At the riding school some of the children enjoyed the riding turn by turn and some stayed watching them. During the period it was observed that both the petitioners were trying to speak with their children but the children were avoiding to speak or have communication with them.

7) After 1 hour or so, three children left the spot. It was informed that the children might have gone to the Amateurs Riding Club. We all left the Amateurs Riding School for the Amateurs Riding Club. After reaching the Riding club, three children could not be noticed. It was informed by the Guardian that they have left for their residence. The petitioners requested the children to have snacks at the Amateurs Riding Club but they refused and they left for their residence. Scheduled Child Access was concluded at around 1.15 p.m.

8. During the access it was observed that the children were reluctant to speak to the petitioner mothers and were trying to avoid their company when they were approached by them.

9) Both the parties co-operated accordingly.
Hence, this report.”

(Emphasis supplied)

6. It would be quite clear from a reading of the report that though the petitioner-mother was trying to speak to the children but,

the children were avoiding to speak to their mother or to have any communication with them. The children also refused to take snacks which was brought by the petitioners. The Observer has observed that the children were reluctant to speak to the petitioner-mother and was trying to avoid talks by them.

7. On this background, the Court heard the matter on 14.2.2018. It was thought appropriate that for the next ensuing access, the children be accompanied by only one representative by the respondent-husband for the access which would be taken on 17.2.2018.

The Court accordingly passed the following order :

“In pursuance of the order dated 31st January 2018, the Observer from the Maharashtra Legal Services Authority has placed on record a report on the access, which was granted on 3rd February 2018. Learned counsel for the petitioners considering the report, suggests that in the peculiar facts of the case and considering the psychology of the children, it will be appropriate that three minor children namely Mustafa and Murtuza, sons of Mrs.Arwa Taha Saifuddin (Petition in Petition No.11830 of 2016) and Hussain, son of Mrs.Fatema Ibrahim Ezzuddin (Petitioner in Writ Petition No.11831 of 2016) being the minor children and who are available in Mumbai be granted access without the company of the other children who are elder in age to these minor children and also who are not available in Mumbai and who are at Surat. Mr.Lalwani, learned counsel for the respondents in both these petitions in instructions is not opposed these suggestions.

2. Accordingly, it is in the interest of justice that such an arrangement of access be made, however the same shall continue under the observation of a responsible officer to be nominated for the said purpose by the Registrar (Judicial (I) to act as an Observer and placed on record of this court a report of the access. The respondents are accordingly directed to provide access of the above three minor children to the petitioners in the above writ petition at the Club House building of

the Amateurs Riding club, Mahalaxmi, Mumbai on 17th February 2018. Only one independent person shall be accompanied with the children and no other person other than the said person shall remain present during the access. Let the access be undertaken between 12.00 noon to 4.00p.m. on 17th February 2018.

3. *As regard the fees of the Observer in regard to the access as taken on 3rd February 2018, the same shall be paid by the respondents which shall be Rs.5000/-.*

4. *Office to forward the copy of this order to the Registrar Judicial (I) for appropriate compliance.*

5. *Stand over to 22nd February, 2018 high on board.*

8. The Observer accordingly has placed the report on record of this Court in regard to access held on 17.2.2018, inter alia recording that the petitioners-mothers were keen to meet the children, however, the children were present not for more than five minutes and avoided conversation with the petitioners-mothers. It would be appropriate to refer to the report which reads thus :

R E P O R T

“ Pursuance to the directions issued on 14.02.2018 by the Hon'ble Court (Coram:G.S.Kulkarni, J) the Registrar (Judl-I) has appointed undersigned as an “Observer”.

1) *Accordingly, the undersigned reached the Club House Building of the Amateurs Riding Club, Mahalaxmi, Mumbai on 17/02/2017 at 11.50 a.m.*

2) *Signatures of the following three persons were obtained viz;*

(a) *Fatema Ibrahim Ezzuddin (b) Arwa Taha Saidfuddin*

(c) *Mufaddal Motiwala.*

3) After Mufaddal Motiwala's identity verification, I asked him about children. He replied "they are sitting outside the club in a car.". He immediately went out and brought all three of them inside where we all were sitting.

4 After introduction with the undersigned all three children sat at few meters distance away from me for about five minutes. Before beginning any conversation between mothers and children, all three dashed out of the club.

5) The Guardian Motiwala informed us that the children had left to their residence. Post hearing his statement both the petitioners wept with grief and urged him multiple times to bring the children back to the club.

6) The Guardian Motiwala made a call then he informed us that children are disinclined to come and meet their mother.

7) The petitioners informed that they had made arrangements of horse to fulfill the desire of horse riding of their children for rejoice and pleasure. Arrangements of snacks for children was made too.

The Scheduled access of three children was concluded at around 12.20 p.m.

A. The petitioners/mothers were keen to meet their children.

B. Children were present for not more than minutes and without having any conversation with the petitioners/mothers they left the club.

C. Car driver drove off the adolescent children to their residence but, it is not known under whose instruction he took them away.

(Emphasis supplied)

9. On this background, I have heard learned counsel for the parties on these petitions.

10. The situation in the present case is very strange. The Petitioner-Arwa in Writ Petition No.11830 of 2018 of 2016 (Arwa Taha

Saidfuddin) and the Petitioner-Fatema in Writ Petition No.11831 of 2018 (Fatema Ibrahim Ezzuddin) are concerned for their following minor children:

Children of Arwa Taha Saifuddin

Sr.No.	Children	Date of Birth
1.	Daughter Sakina presently about 18 ½ years	30.07.1999
2.	Son Mohammad presently about 16 ½ years	20.07.2001 (minor)
3.	Son Taher presently about 13 ½ years	20.08.2004 (minor)
4.	Son Mustafa presently about 12 years	03.03.2006 (minor)
5.	Son Murtaza presently about 9 years	08.03.2009 (minor)

Children of Fatema Ibrahim Ezzuddin

Sr.No.	Children	Date of Birth
1.	Daughter Khadija presently about 19 ½ years	17.07.1998
2.	Son Murtaza presently about 16 years	15.02.2002 (minor)
3.	Daughter Nisreen presently about 13 ½ years	06.10.2004 (minor)
4.	Son Hussain presently aged 9 years	15.12.2008 (minor)

11. The background as seen is that the access of the children to the petitioner-mothers have not fetched any success. The children come for the access and immediately leave. It thus clearly appears that the psychology of the children and/or the state of mind of the children

to come to terms and have an inter-action and/or spend time with their mothers is totally absent. The situation thus, is quite peculiar in as much as the children who were the beneficiaries of the love and affection in of both their parents up to January 2014 when the parents were together and how the children appear to be totally estranged. It is in these circumstances, the Court would be required to consider the issues as to how this unusual and sheer situation can be overcome so that the desire of the petitioners-mothers that they have access and/or interim custody of the children can be cogently decided.

12. The petitions arise out of an interim order passed by the Family Court, Mumbai. The effect of the interim order passed by the Family Court is that the Family Court has directed that the non-custodian mothers are entitled to access of the children as noted above. The grievance of the petitioners in these petitions is firstly that the issue of interim custody has not been considered by the Family Court in passing the impugned order. The second grievance is that 50% vacation access has also not been considered. It is the further submission of the learned counsel for the petitioners that there are no reasons in the impugned order either for not considering and/or even to reject the said prayers. Learned counsel for the petitioners has

extensively made submissions on the entire background of the dispute between the parties as to how the children were attached to the mothers till the petitioners had taken the children to United States of America in January 2014 and that only after the children returned from the US on the background of the proceedings before the California Court, the behaviour of the children has become indifferent and strange. I have been also taken through the different orders which were passed by the US Court, which are primarily on the Court not having jurisdiction to entertain the proceedings. It is also the case that US Court had passed an order and handed over the custody of the children to the respondent-father, which is how they were brought back to India. No doubt, before the proceedings were initiated before the US Court, the respondent-father had approached the Family Court at Mumbai by filing Custody Petition seeking custody of the children and it is these petitions which are pending the orders, as impugned in the present petitions are passed.

13. On the other hand, learned counsel for the respondent also argued on the nature of the dispute between the parties. He would urge that the respondent-husbands were never averse to grant of access of the children to the petitioner-mothers. It is pointed out that

however, every report has recorded that the children are not in a mental state of mind to meet the petitioner-mothers and it is for this reason the access has not been satisfactory. Learned counsel for the respondent would submit that the principal dispute between the parties is not a normal matrimonial dispute but disputes and differences which arises on account of certain religious beliefs and assertion of such religious beliefs on the part of the parties, which are in relation to the succession to the religious head of the community namely Syedna Mohammed Burhanuddin, who passed away on 17.1.2014.

14. I have also been taken through the various observations made by the US Court as also to the different orders which have been passed by the Family Court from time to time as also order dated 23.12.2015 passed by this Court in *Writ Petition No.8231 of 2015 and other petitions* whereby considering the challenge to the order passed by the Family Court, deferring a decision on access and custody and a report to be submitted by the counsellors before Family Court, this Court had passed the following order:-

A) “ *Between 25 December 2015 and 31 March 2016 the respondents in each of these petitions are directed to grant to the petitioners access and visitation rights to the children on at least four occasions. The first of such occasion shall be between 25 December 2015 and 31 December 2015. The precise date during this period may be decided by the parties themselves depending upon the academic or other schedules of the children. In case of any difficulty, the Family Court which is seized of the*

matters may make appropriate orders in this regard.

B). The access as aforesaid shall be for the entire day. i.e. between 10.00 a.m. and 5.00 p.m. at the petitioners' apartment at Malbar Hill or any other suitable venue other than the place where the children presently reside alongwith the respondents. The access shall be under the supervision of at least one counselor agreed to by the parties and failing such agreement deputed by the Family Court which is seized of the matters.

C) The respondents to make arrangements to reach the children at the venue of access by 10.00 a.m. and to pick up the children by 5.00 p.m. on the same day., However, neither the respondents nor any person on their behalf shall remain present at the venue of access during the access/visitation and further they shall not obstruct such access/visitation.

D) The counsellors to file reports of the supervised access before the Family Court as far as possible within seven days from respective access dates. The Family court shall be at liberty to furnish copies of such reports to the parties.

E) Upon receipt of four reports from the counsellors by 7 April 2016 the Family Court after afford of opportunity of hearing to the parties and if deemed necessary by interviewing the children, dispose of the motion for interim custody, access and visitation rights in accordance with law latest by 30 April 2016.

F) In order to facilitate access/visitation as granted by this order, the Family court is empowered to make orders/directions from time to time particularly in the matters of venue dates etc. The Family Court will no doubt take into consideration the academic and other schedules of the children so that they are affected in the minimum. The parties shall be at liberty to apply to the Family Court in this regard.

G) The observations in this order are prima facie and the same are not be construed as reflection upon the conduct of the either parties. The Family Court which is seized of the matters, is therefore directed to dispose of the motions for interim custody, access and visitation rights based upon the material which may be placed before it and in accordance with law.

H) Rule is disposed of in the aforesaid terms in both the petitions.

I) The Civil Applications are also disposed of in the aforesaid terms.

J) All concerned to act on the basis of authenticated copy of this order.”

15. On the above conspectus, having heard learned counsel appearing for the parties and having considered the entire background of this litigation, in my opinion, at this stage of the proceedings it is crucial that the psychology and/or the state of mind of the children is first made conducive so that the attitude of the children showing reluctance to meet the mothers is first attended, without which neither the access nor the visitation rights become meaningful. Mrs.Irani would not dispute that such behaviour of the children is seen not only in the last two accesses as fixed at different venues but even on the earlier occasions at the children's complex of the Family Court. Thus interest of justice would be served if the parties are directed to have regular counselling sessions of the minor children to be undertaken by the counsellor Dr.Nulwalla, whose appointment as a counsellor has been fairly agreed by both the sides. In the circumstances, until and unless there is a substantial progress on this front and there is a satisfactory report of Dr.Nulwalla it would not be appropriate as also in the interest of the children to accept the prayers of the petitioners for grant of interim custody of the children as prayed. The concern of the Court

would also be the welfare and the paramount interest of the children while considering orders to be passed on the access/visitation and custody rights of the parents. Nothing which would cause any prejudice to the interest of the children can be expected to be done by the Court.

16. Thus, considering the peculiar facts of the case and in interest of justice, it would be appropriate that counselling sessions are undertaken for the minor children at least for a period of four months which shall be under the supervision of the learned Judge of the Family Court who is presiding over the proceedings. The parties shall be at liberty to approach the Family Court in regard to any issue which may arise in respect of counselling to be undertaken by Dr.Nulwalla. After regular counselling sessions are undertaken by Dr.Nulwalla for a period of four months, Dr.Nulwalla shall place on record of the Family Court a report clearly setting out the state of mind of the children so as to enable the Family Court to decide the issue of visitation rights and/or interim custody of the minor children. The petitioners are at liberty to make appropriate prayers once the report of Dr.Nulwalla is placed on record of the Family Court. Ordered accordingly.

17. It is clarified that in the intervening period the access of the children as being granted by the impugned interim order shall continue to operate.

18. The petitioners shall approach Dr.Nulwalla who shall fix the schedules for counselling and inform the respondents who shall make the children available for counseling on the dates so fixed. As some children are studying at Surat (Gujarat) it would be appropriate that in respect of these children, counselling sessions, be held three times a month and it may be varied between Saturdays and Sundays.

19. At this stage,Mr.Lalwani learned counsel for the respondent has pointed out that Mohammed and Taher the sons of Petitioner-Arwa Taha Saidfuddin in Writ Petition No.11830 of 2016 and Murtuza, son of petitioner-Fatima in Writ Petition No.11831 of 2016 have been sent for academic assignment to Nairobi campus of Aljamea-tus-Zaifiyah Trust, Surat and that the children would be returning to India on 4.4.2018. Mrs.Irani learned counsel for the petitioners claims this to be a surprise and has serious objection to the removal of the children out of the country without the permission of the Court more particularly when the access orders are passed by the

Family Court and which are subsisting and leave of the Court has not been taken, as also no intimation of this was given to the petitioner-mothers when the petitions were pending before this Court. There is much substance in the submissions as urged by Mrs.Irani learned counsel for the petitioners. Propriety demanded that the respondent-husband should have taken prior permission of the Family Court before sending these children outside the country. Henceforth, this shall not happen and any aberration of such nature shall be viewed seriously.

20. It needs to be observed that such action on the part of the respondents is not acceptable and more particularly when there are orders of access which are passed, whereby access would be taken on Saturdays and the children are required to be made available by the respondent. At least the basic requirement of taking permission of the Family court ought to have been complied by the respondent. Thus, it is directed that hereafter if the children are removed outside the country, then prior permission of the Family Court shall be taken by the respondent.

21. Mr.Lalwani learned counsel for the respondent submits that the children would be returning to India on 4.4.2018 and for any

further assignment outside the country, prior permission of the Family Court would be taken. Statement is accepted.

22. In the above circumstances, qua the children who are now immediately available counselling sessions shall immediately commence on the dates as may be fixed by Dr.Nulwalla which may be fixed from the week commencing from 1.03.2008 onwards.

23. It is expected that the respondents shall extend full cooperation of making available the children for counselling sessions and that they shall comply with these orders and directions as also the orders/directions that may be passed by the Family Court from time to time, on the issues in regard to the access and custody of the children.

24. Dr.Nulwalla shall place a report on the record of the Family Court by **30.7.2018**.

25. All contentions of the parties in regard to access and custody of the children are expressly kept open to be agitated before the Family Court in the pending proceedings which may be considered in the light of the report of Dr.Nulwalla.

26. Resultantly, the petitions would not require any further adjudication. Petitions are accordingly disposed of in above terms. No costs.

27. Learned counsel for the parties are ad-idem that the custody proceedings are pending for quite sometime. It would be appropriate that the custody petition is disposed of as expeditiously as possible. The learned Judge of the Family Court may endeavour to dispose of the proceedings after receipt of the report of Dr.Nulwalla and preferably dispose of the same on or before 31.12.2018. The Family Court shall also consider and dispose of the pending interim application as if any if the pleadings therein are complete and if not, the parties shall complete the same within three weeks from today.

(G.S.KULKARNI, J.)

